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No. 00-346

IN THE

Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner,

v.

CELESTINE GARRIS, ADMINISTRATRIX OF THE ESTATE OF CHRISTOPHER GARRIS, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Fourth Circuit erred in extending *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), a case which was superseded and reversed by Congress in 1972, to create a new judge-made general maritime law wrongful death cause of action in negligence for the accidental death of a non-seaman in state territorial waters?

PARTIES TO THE PROCEEDING

All parties to the proceeding below are identified in the caption of this case except E. T. Gresham, Inc. ("Gresham"). Gresham was originally named as a co-defendant in this action and participated in the proceedings before the United States Court of Appeals for the Fourth Circuit. Upon motion of Celestine Garris, the Court of Appeals entered an order dismissing Gresham from this action, with prejudice, on May 1, 2000. (App. 6a)

CORPORATE DISCLOSURE STATEMENT

The parent company of the petitioner, Norfolk Shipbuilding & Drydock Corporation ("Norshipco"), is United States Marine Repair, Inc. No publicly held company owns 10 percent or more of Norshipco stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix F (21a-49a), and is reported at 210 F.3d 209 (4th Cir. 2000).

The opinion of The Honorable Cynthia Holcomb Hall, United States Circuit Court Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation and concurring in the judgment of the Fourth Circuit, appears at Appendix F (50a-61a), and is reported at 210 F.3d 209, 222 (4th Cir. 2000).

The opinion of The Honorable H. Emory Widener, Jr., dissenting to the Fourth Circuit's denial of Norshipco's petition for rehearing en banc appears at Appendix H (64a-67a).

The opinion of the United States District Court for the Eastern District of Virginia appears at Appendix E (13a-21a), and is reported at 1999 A.M.C. 769 (E.D. Va. 1998).

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were entered on April 3, 2000. (App. 21a) Norshipco timely filed a petition for rehearing en banc on April 17, 2000 (App. 6a), which the Court of Appeals denied by order entered June 1, 2000. (App. 62a-63a) Norshipco timely filed a petition for a writ of certiorari on August 30, 2000. (App. 7a) This Court granted Norshipco's petition by order entered December 11, 2000. (App. 7a) Jurisdiction exists pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are pertinent in assessing whether the Fourth Circuit erred in creating a new, judge-made general maritime law wrongful death cause of action in negligence for the accidental death of a non-seaman in state territorial waters.

United States Constitution, Article III, Section 2, clause 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all cases affecting Ambassadors, other public Ministers and Consuls, to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Death on the High Seas Act, 46 U.S.C.A. §§ 761, 767 (West 1975):

> **§ 761. Right of action; where and by whom brought**
>
> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of

the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

The Jones Act, 46 U.S.C.A. App. § 688(a) (West Supp. 2000):

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be

> under the court of the district in which the defendant employer resides or in which his principal office is located.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 903(a), 904, 905(a)-(b), 909 (West 1986), *reprinted at* App. I (68a-72a).

The Virginia Wrongful Death Act, Va. Code Ann. § 8.01-50(A) (Michie 1992):

> Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony.

The Virginia Workers' Compensation Act, Va. Code Ann. §§ 65.2-302, -307, -512, -515, -516 (Michie 1995 & Supp. 1999), *reprinted at* App. I (73a-77a).

STATEMENT OF THE CASE

The Incident

On April 8, 1997, harbor worker Christopher Garris suffered fatal injuries while working aboard the *USNS Maj. Stephen W. Pless* (the "vessel"). (App. 9a) At the time of the incident, the vessel was docked in navigable waters at Norshipco's facility in Norfolk, Virginia. (App. 9a, 22a) Norshipco, a ship repair company, had contracted to perform certain work on the vessel. (App. 9a) Christopher Garris was employed by Tidewater Temps, Inc. to perform sandblasting work for Mid-Atlantic Coatings, Inc., a subcontractor of Norshipco. (App. 9a, 22a) Another subcontractor, E.T. Gresham, Inc., was operating a crane alongside the vessel. (App. 9a, 22a) The Gresham crane operator allegedly accidentally caused Garris to fall off a 30-foot high reserve hopper used to store sand for sandblasting on the vessel. (App. 14a, 22a) Christopher Garris died as a result of the fall. (App. 14a-15a, 22a)

Plaintiff Pursues State And Federal Remedies

Christopher Garris's mother, Celestine Garris ("Garris" or "plaintiff"), collected statutory death benefits from Tidewater Temps, Inc. under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). (App. 20a) In addition to her LHWCA recovery, Garris initially filed suit against Norshipco and Gresham in Virginia state court but nonsuited that action following the filing of a demurrer and other motions by defendants.[1] (App. 15a)

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1. Virginia law recognizes a state wrongful death claim but holds that no general maritime cause of action exists for the negligent death of a non-seaman in state territorial waters. *Brown v. Brown*, 226 Va. 320, 327, 309 S.E. 2d 586, 590 (Va. 1983), *cert. denied*, 467 U.S. 1242 (1984). (App. 15a)

Shortly thereafter, Garris filed a civil action against Norshipco and Gresham in the United States District Court for the Eastern District of Virginia asserting a purported general maritime law wrongful death claim for negligence and a state law negligence claim under the Virginia Wrongful Death Act. (App. 8a-10a) Garris demanded "damages pursuant to the general maritime law for funeral expenses, pain and suffering of the decedent prior to his death, loss of society and loss of services" and "damages pursuant to the Virginia Wrongful Death Act, § 8.01-52." (App. 10a) Garris's complaint alleged that the district court had jurisdiction pursuant to 28 U.S.C. § 1333. (App. 9a)

The District Court Dismissal: No Federal Cause Of Action Under *Moragne* Or General Maritime Law

Norshipco and Gresham moved to dismiss both of plaintiff's claims. (App.11a-12a, 13a) The district court dismissed the federal maritime claim with prejudice, holding that *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), did not create a cause of action for the death of a non-seaman in state territorial waters resulting from negligence and that no such cause of action exists under general maritime law. (App. 13a-20a) The district court declined to exercise supplemental jurisdiction over Garris's state wrongful death claim and dismissed that claim without prejudice. (App. 20a)

The Fourth Circuit Agrees *Moragne* Does Not Provide A Remedy For Garris

Garris appealed to the United States Court of Appeals for the Fourth Circuit. A three-judge panel heard the appeal. (App. 21a) In the majority opinion, two judges "agree[d] with the district court and conclude[d] that *Moragne* did not recognize a general maritime law cause of action for wrongful

death based upon negligence." (App. 40a) *Moragne*, the two-judge panel decision held, "was, both at its heart and in its facts, an unseaworthiness case." (*Id.*)[2]

A Result-Oriented Decision

The Fourth Circuit majority found that Garris was not entitled to recover tort damages against Norshipco under the existing federal and state statutory schemes given her son's status as a land-based harbor worker (rather than a seaman) and the situs of his death within Virginia state territorial waters:

> In the present case, Garris has no right of recovery under the existing statutory scheme. Garris cannot recover under DOHSA because her son died within state territorial waters. She cannot recover under the Jones Act because her son was a harbor worker, and not a seaman. And, she apparently cannot recover against Norfolk under the Virginia wrongful-death statute because the Virginia worker's compensation statute confers broader immunity than the LHWCA; unlike the LHWCA, which bars suit only against the immediate employer . . . the Virginia statute bars state tort claims against contractors as well as immediate employers. . . . *See* Va. Code Ann. §§ 65.2-302, 307 (Michie Supp. 1999); *Ward v. Norfolk Shipbuilding & Drydock Corp.*, 770 F. Supp. 1118, 1120 (E.D. Va. 1991). . . . (App. 43a-44a; footnotes omitted)

The panel thus looked to general maritime law for a tort remedy, noting that Garris would not be able to recover

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2. The third member of the panel wrote a concurring opinion agreeing with the majority's judgment but arguing that "*Moragne* itself created a cause of action for negligence-based wrongful death." (App. 50a-61a) (Hall, J., concurring)

damages from Norshipco "absent a federal maritime law cause of action for wrongful death based upon negligence." (App. 45a) After concluding that *Moragne* did not provide the desired remedy (App. 40a), the majority voiced its subjective belief that tort recovery should not be denied based upon the "happenstance" facts of the decedent's occupational status and situs of injury[3] and proceeded to extend *Moragne* to create a new general maritime wrongful death cause of action for Garris to assert against Norshipco:

> Because such a cause of action is consistent with the framework set forth in *Moragne*, we hold that a general maritime law cause of action against third parties for wrongful death based upon negligence is available where a harbor worker, such as Garris's son, dies within state territorial waters. (App. 47a-48a)

The court offered two reasons for its result-oriented ruling: absence of a federal statute expressly excluding a negligence-based action and furtherance of *Moragne*'s uniformity principle. (App. 49a)

Dissent From Denial Of Rehearing En Banc

Norshipco timely filed a petition for rehearing en banc. (App. 62a) Although Norshipco failed to obtain a majority vote in favor of rehearing, Judges Widener and Niemeyer did vote for rehearing. (App. 62a-63a)

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3. The court stated:

> We see no reason to deny Garris a basis of recovery simply because her son was a harbor worker who died in Virginia, as opposed to another state that permits recovery against contractors. . . . The location of a harbor worker's death — a fact of true happenstance — should not determine an injured party's ability to recover for wrongful death. (App. 45a-47a)

Judge Widener wrote a dissenting opinion to the denial of rehearing en banc. (App. 64a-67a) In his dissent, Judge Widener argued that the panel's reliance upon *Moragne* is misplaced because the 1972 amendments to the LHWCA effectively "superseded and reversed" *Moragne* (App. 66a) and that "the panel opinion creates a new cause of action which is exactly the opposite of that which Congress intended" when it passed the 1972 amendments to the LHWCA. (App. 67a)

SUMMARY OF ARGUMENT

Neither the relevant acts of Congress (DOHSA, the Jones Act and the LHWCA) nor this Court's decision in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), provides a negligence-based wrongful death cause of action for non-seamen killed in state territorial waters. Land-based persons, including harbor workers such as Garris's decedent, are instead covered by state wrongful death law, in this case the Virginia Wrongful Death Act, Va. Code Ann. § 8.01-50 *et seq*. (Michie 1992). In accordance with the principles of federalism, a court exercising admiralty jurisdiction over a wrongful death claim involving a land-based worker must identify and enforce the limits of the applicable state wrongful death law to the claim before it. *Hess v. United States*, 361 U.S. 314, 320 (1960) (The power of a State to create a right of action for death "includes of necessity the power to determine when recovery shall be permitted and when it shall not."); *The Tungus v. Skovgaard*, 358 U.S. 588, 592 (1959) ("... when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached"); *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921). The Fourth Circuit should not have disregarded the pronouncements of Congress and this Court in order to create a new general maritime remedy for Garris's benefit. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990)

(". . . we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them").

The Fourth Circuit accordingly erred in extending *Moragne* to create a general maritime cause of action for the negligence-based wrongful death of a non-seaman in state territorial waters. The court's new remedy — fashioned solely to circumvent the anticipated application of Virginia's statutory employer law immunizing Norshipco from tort liability to Garris under the Virginia Wrongful Death Act — contravenes Congress's express intent to reserve the provision of remedies for the wrongful death of a non-seaman occurring in state territorial waters to the States and impermissibly intrudes upon the States' powers to protect their citizens by delineating remedies for tortious conduct causing death within state borders. This new remedy cannot be justified on professed "uniformity" grounds as the wrongful death of a harbor worker occurring in state territorial waters is maritime and local in character (*Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921)) and the general maritime law has never viewed the subject matter of negligence-based wrongful death remedies as being one of its "characteristic features" or the provision of state remedies as "interfering with the proper harmony and uniformity of that law in its international or interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917); *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994). The Fourth Circuit's ruling must accordingly be reversed.

ARGUMENT

The Fourth Circuit Erred In Extending *Moragne* To Create A New General Maritime Law Cause Of Action For The Negligence-Based Wrongful Death Of A Non-Seaman In State Territorial Waters.

Because Garris's son died while working on a ship docked in navigable waters (App. 9a), her wrongful death claim falls within the court's admiralty jurisdiction. *Yamaha Motor Corp., U.S.A v. Calhoun*, 516 U.S. 199, 206 (1996). "With admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986). Substantive admiralty law includes both federal legislation (*In re Garnett*, 141 U.S. 1, 12 (1891)) and judge-made general maritime law. *The Lottawanna*, 88 U.S. 558 (1875). Neither affords Garris the remedy created by the Fourth Circuit in this case.

I. The Fourth Circuit's Newly-Declared Cause Of Action Is Not Found In Federal Statutory Or General Maritime Law.

A. Congress Has Declined To Provide A Remedy For The Wrongful Death Of A Non-Seaman In State Territorial Waters, Expressly Leaving This Subject Matter To The States.

Congress has enacted a number of statutes governing maritime rights and remedies pursuant to its powers under the Admiralty and Commerce clauses of the Constitution. 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 4-1 at 147-148 (3d ed. 2001). Where such legislation exists, the courts must primarily look to it in resolving questions concerning the availability of remedies under the general

maritime law. The primacy of federal maritime legislation in determining remedies was succinctly stated in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990):

> We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to those legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. (*Id.* at 27)

Three federal statutes grant remedies for wrongful death occurring in navigable waters: the Jones Act, 46 U.S.C.A. App. § 688(a) (West Supp. 2000); the Death on the High Seas Act ("DOHSA"), 46 U.S.C.A. § 761 (West 1975); and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C.A. § 901 (West 1986). Significantly, none of these statutes, which delineate remedies based upon occupational status and/or situs of death (the same factors which the Fourth Circuit deemed immaterial "happenstance" below)[4], provides a cause of action for the negligence-based, wrongful death of a non-seaman in state territorial waters.

The Jones Act grants the personal representative of a seaman killed in the course of employment a wrongful death remedy against the seaman's employer. 46 U.S.C.A. App. § 688(a). Christopher Garris was a "land-based," temporary

4. App. 45a-47a.

employee of a ship repair company (App. 14a) and thus did not possess seaman status under the Jones Act. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Absent seaman status, no cause of action exists under the Jones Act. *Id.* at 355.

As a sandblaster working on a vessel docked in navigable waters, Christopher Garris was a harbor worker covered by the LHWCA. 33 U.S.C.A. § 902(3) (West 1986). This statute provides a workers' compensation death remedy against the "employer," 33 U.S.C.A. §§ 902(4), 909, and a negligence-based cause of action against "the vessel." 33 U.S.C.A. § 905(b). The LHWCA does not afford a negligence-based, wrongful death claim for Garris to assert against Norshipco.

DOHSA provides a wrongful death cause of action uniformly applicable to all classes of people. DOHSA, however, applies only when death is caused by a wrongful act "occurring on the high seas beyond a marine league from the shore of any State. . . ." 46 U.S.C.A. § 761. Congress notably left intact the state wrongful death remedies available for deaths in state territorial waters. *See* 46 U.S.C.A. § 767; *Miles v. Apex Marine Corp.*, 498 U.S. 19, 25 (1990). Because Garris alleges that Norshipco caused her son's death aboard a vessel berthed at Norshipco's facility in Virginia state territorial waters, she cannot assert a claim under DOHSA. (App. 9a)

B. General Maritime Law Does Not Provide A Negligence-Based Cause Of Action For Wrongful Death Occurring Within State Territorial Waters.

1. Maritime Law Has Long Relied On State Wrongful Death Acts To Supply A Negligence-Based Wrongful Death Remedy Unavailable Under Federal Common Law.

Actions for death occurring on navigable waters have a unique history quite different from personal injury actions.

While affording a remedy for those injured on navigable waters, maritime law originally followed the common law rule whereby a tort action died with the injured party. The Court accordingly held in *The Harrisburg*, 119 U.S. 199 (1886), *overruled in part*, 398 U.S. 375 (1970), that absent a statute giving the right, no wrongful death cause of action would lie in the courts of the United States under the general maritime law. *Id.* at 213-214.

Following *The Harrisburg*, admiralty courts began applying state wrongful death acts to permit recovery for deaths in state territorial waters. *See Moragne*, 398 U.S. at 393 ("For deaths within state territorial waters, the federal law accommodated the humane policies of state wrongful-death statutes by allowing recovery whenever an applicable state statute favored such recovery.").[5]

In *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), the Court specifically approved the application of state wrongful death statutes based upon the "maritime and local" nature of a death occurring in state territorial waters as a result of a tort committed within the state:

> . . . we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common

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5. State statutes were also occasionally deemed to permit recovery for death on the high seas prior to the enactment of DOHSA in 1920. *See, e.g. The Hamilton*, 207 U.S. 398 (1907) (Delaware wrongful death statute applied to collision on high seas of two vessels owned by Delaware corporations).

> law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. (*Id.* at 242)

Subsequent Supreme Court decisions uniformly upheld the application of state wrongful death acts for non-seamen killed in state territorial waters. *See, e.g. The Tungus v. Skovgaard*, 358 U.S. 588 (1959) (right to recover for death of non-seaman in state territorial waters depends entirely upon the state's wrongful death statute); *Hess v. United States*, 361 U.S. 314 (1960) (action for wrongful death in state territorial waters governed by state statute).

In 1970, the Court overruled *The Harrisburg*, 119 U.S. 199 (1886), holding in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), that an action for wrongful death based on unseaworthiness is maintainable under federal maritime law. The Court has since reaffirmed the continuing application of state law remedies for negligence-based wrongful death. *Yamaha v. Calhoun*, 516 U.S. 199 (1996) (state law wrongful death remedies applied to jet skier killed in state territorial waters).

2. *Moragne* Did Not Create A New General Maritime Cause Of Action For Negligence-Based Wrongful Death, But In Fact Confirms The Application Of State Law Remedies For Negligent Death In State Territorial Waters.

a. *Moragne* Addressed Unseaworthiness Only

The Fourth Circuit correctly concluded that *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), "was, both at its heart and in its facts, an unseaworthiness case." *Garris*, 210 F.3d at 219 (App. 40a); *see Yamaha*, 516 U.S. at 209; *Ford v. Wooten*, 681 F.2d 712, 715 (11th Cir. 1982), *cert. denied*,

459 U.S. 1202 (1983); *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 527 (5th Cir. 1979), *cert. denied*, 446 U.S. 956 (1980); *Brown*, 309 S.E.2d at 590, and thus did not create a general maritime remedy for negligence-based wrongful death.

A brief review of *Moragne* confirms the point. *Moragne* involved the death of a longshoreman in Florida territorial waters. *Moragne*, 398 U.S. at 376. The decedent's widow ("Moragne") filed a wrongful death action in Florida state court alleging state law negligence and unseaworthiness of the vessel. *Id.* Defendant removed the case to federal court and obtained dismissal of the unseaworthiness claim on the grounds that the Florida wrongful death statute "did not encompass unseaworthiness as a basis of liability" and the general maritime law did not recognize such a claim. *Id.* at 377. Moragne's negligence claim under the Florida wrongful death statute remained pending and thus was not before the Court on appeal. The only issue for decision was whether the general maritime law should be deemed to afford a wrongful death cause of action based upon the uniquely maritime concept of unseaworthiness. *Id.*

The Court answered "yes", overruling *The Harrisburg* and holding that an action does lie under maritime law for death caused by violation of maritime duties. *Id.* at 409. That *Moragne*'s holding is directed to "unseaworthiness" only is plain: unseaworthiness was the only issue before the Court and the Court's analysis focused on (1) the unforeseen development of unseaworthiness as a primary means of recovery under admiralty law[6] (and its absence from many

6. Between *The Harrisburg* decision in the late 1800's and the *Moragne* decision in 1970, the Court had "transform[ed] the shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence." *Moragne*, 398 U.S. at 399. The Court in *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946), extended the warranty of seaworthiness to longshoremen "performing the (Cont'd)

state wrongful death statutes); and (2) the three seaworthiness-related "anomalies" that would be perpetuated if Congress was deemed to have intended DOHSA and the Jones Act to preclude such recovery. Following this analysis, the Court concluded that recognition of unseaworthiness as a general maritime law wrongful death cause of action would further Congress's stated purpose of "uniformity in the exercise of admiralty jurisdiction" when it enacted the Jones Act. *Id.* at 401.[7]

Moragne thus acted as a gap-filler in the existing remedial scheme, ensuring uniform rather than ad hoc availability of an unseaworthiness remedy in all fifty states. *Yamaha*, 516 U.S. at 217 ("The *Moragne* cause of action was in many respects a gap-filling measure to ensure that seamen (and their survivors) would all be treated alike.") (citing *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d at 641-642).

(Cont'd)
ship's service." 328 U.S. at 97. The unseaworthiness doctrine, therefore, created "a strict liability obligation" running from shipowners to seamen and (at that time) longshoremen. *Miles*, 498 U.S. at 25. After *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944), and *Sieracki*, the easily met unseaworthiness standard became the "principal vehicle for recovery" in maritime tort cases against shipowners, completely "overshadowing" negligence. *Moragne*, 398 U.S. at 399; *see Yamaha*, 516 U.S. at 208 (unseaworthiness "eclipsed ordinary negligence as the primary basis of recovery").

7. The 1972 amendments to the LHWCA reversed *Sieracki* and *Moragne* by abrogating vessel liability to longshoremen based on unseaworthiness. *See* 33 U.S.C.A. § 905(b) (West 1986). Thus, only two years after the Court fashioned an unseaworthiness remedy for the longshoreman's widow in *Moragne*, Congress legislatively abrogated the remedy. *See* Dissent of Widener, J., to Order Denying Rehearing En Banc (App. 66a-67a).

b. *Moragne* Left State Law Remedies For Negligence-Based Wrongful Death Intact.

Although not directly at issue in *Moragne,* the Court's opinion demonstrates that the remedy for negligence-based wrongful death is adequately and appropriately provided by state rather than general maritime law. Foremost, as this Court observed in *Yamaha, Moragne* "notably left in place the negligence claim [the widow] had stated under Florida's law." *Yamaha*, 516 U.S. at 214. The Court did not need or seek to create a uniform maritime remedy for negligence-based wrongful death as the Court recognized that "every State today has enacted a wrongful-death statute," thereby affording a negligence-based wrongful death remedy throughout the nation. *Moragne*, 398 U.S. at 390.

Moreover, *Moragne* specifically discussed the significant preemption problem that would inevitably arise if the general maritime law recognized a negligence-based, wrongful death remedy applicable in state territorial waters. The *Moragne* Court carefully explained that when Congress passed DOHSA, it "intended to ensure the continued availability of a remedy, historically provided by the States, for deaths in territorial waters." *Moragne*, 398 U.S. at 397; *see Miles*, 498 U.S. at 25 ("Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas"); 46 U.S.C.A. § 767 (West 1975) ("the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter"). "The express provision that state remedies in territorial waters were not disturbed by [DOHSA] ensured that Congress' solution of one problem would not create another by inviting the courts to find that [DOHSA] pre-empted the entire field, destroying the state remedies that had previously existed." *Moragne*, 398 U.S. at 398. *Moragne*'s state law sentiments were recently echoed in *Yamaha v. Calhoun*, 516 U.S. 199 (1996), wherein this Court held that federal

maritime law did not displace state wrongful death law concerning the death of a non-seaman (a twelve year-old jet skier) in state territorial waters.

II. Extending *Moragne* To Create A New, Negligence-Based General Maritime Law Wrongful Death Cause Of Action For A Non-Seaman Contravenes Congress's Considered Judgment To Reserve This Area Of Law To The States.

Although the federal judiciary has the power to announce new principles of general maritime law, this Court has declared that such power is to be exercised sparingly and should conform general maritime law to the legislative will. *Miles v. Apex Marine Corp.*, 498 U.S. at 27-33, 36-37. Here, the legislative will dictates that it is state law, not federal maritime law, that is to govern the provision of a wrongful death remedy for Garris to assert against Norshipco. The Fourth Circuit erred in creating a new maritime remedy in contravention of this clear legislative directive.

A. DOHSA Expressly Reserves To The States The Right To Provide And Regulate Rights Of Action For Negligence-Based Wrongful Death Occurring In State Territorial Waters.

In 1920, Congress altered the maritime law by enacting DOHSA and the Jones Act, both of which provide statutory wrongful death causes of action in certain circumstances. *Miles*, 498 U.S. at 23-24.[8] DOHSA was enacted to furnish a wrongful death remedy applicable to all persons "for deaths beyond the jurisdiction of any State." *Moragne*, 398 U.S. at 393. Section 1 of the Act provides a cause of action "[w]henever the death of a person shall be caused by wrongful

8. The Jones Act provides a right of recovery against employers for the negligent injury/death of seamen that "follows from the seaman's employment status and is not limited to injury or death occurring on the high seas." *Moragne*, 398 U.S. at 394.

act, negligence or default occurring on the high seas beyond a marine league from the shore of any State." 46 U.S.C.A. § 761 (West 1975).

Section 7 of the Act expressly exempts state territorial waters from coverage and preserves state sovereignty over the remedies to be afforded for deaths caused by maritime torts within a State's territorial waters. Section 7 states:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone. (46 U.S.C.A. § 767) (West 1975)

DOHSA's legislative history likewise discloses "a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.' " S. Rep. No. 216, 66th Cong., 1st Sess. 3, 4 (1919); H. R. Rep. No. 674, 66th Cong., 2d Sess. 3, 4 (1920); *Moragne*, 358 U.S. at 398. As noted in *Moragne*, Congress sought to ensure the continued availability of a remedy historically provided by the States for deaths in territorial waters and to avoid any possibility of federal preemption of state law remedies in state territorial waters. *Id.* at 398.

The Fourth Circuit's creation of a new general maritime cause of action for negligence-based wrongful death in state territorial waters directly contravenes Congress's considered judgment, plainly expressed in the statutory language and legislative history of DOHSA, to reserve this area of law to the States.

B. The 1972 Amendments To The LHWCA Place Longshoremen And Harbor Workers Such As Garris In The Same Position As Other Land-Based Workers Subject To State Law By Eliminating Special Maritime Causes Of Action.

1. Background Of The LHWCA

In 1927, Congress passed the LHWCA to provide compensation in lieu of tort damages for "longshoremen," land-based workers who perform tasks for, on and around vessels. 1 Schoenbaum, *Admiralty and Maritime Law*, § 7-1 at 380 (3d ed. 2001). The LHWCA, like its state law counterparts, requires employers to pay compensation, without fault, for accidental injuries and deaths arising out of covered workers' employment. In exchange for this compensation without fault, the LHWCA provides a statutory scheme of benefits which are sometimes less than tort damages and grants the employer immunity from tort liability irrespective of fault. *Id.* at 381. The LHWCA was originally enacted to cover workers who were excluded from state law workers' compensation coverage due to the maritime character of their employment. *See Southern Pacific v. Jensen*, 244 U.S. 205 (1917). More recent decisions of this Court recognize an area of concurrent jurisdiction between the LHWCA and state workers' compensation laws. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962).[9]

2. The 1972 Amendments Abrogate *Moragne*

In 1972, Congress enacted various amendments to the LHWCA, including Section 905(b) which specifically

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9. A worker who meets the criteria of a state workers' compensation law and the LHWCA may file for compensation under both, concurrently or successively. *Vega-Mena v. United States*, 990 F.2d 684 (1st Cir. 1993).

abrogated *Moragne*'s provision of an unseaworthiness cause of action for longshore and harbor workers. 33 U.S.C.A. § 905(b); *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165 (1981) (recognizing longshoremen's right to recover for unseaworthiness abolished).

Congress's intent to limit land-based maritime workers to state law remedies against third parties is expressly stated in the legislative history of the 1972 amendments, which provides in pertinent part as follows:

> The purpose of the amendments is to place an employee injured aboard a vessel **in the same position he would be if he were injured in non-maritime employment ashore insofar as bringing a third party action is concerned**, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like. (H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4703; emphasis added)[10]

Judicial creation of a new general maritime wrongful death cause of action flies in the face of this unmistakable Congressional intent to preclude special maritime remedies for land-based workers. Contrary to Congress's directive that an employee injured aboard a vessel be placed "in the same position he would be if he were injured in non-maritime employment ashore" (*Id.*), the Fourth Circuit has created a remedy that embraces disparate treatment by permitting a Virginia employee who happens to be injured on a vessel to assert a third party claim against a contractor that Virginia's workers' compensation law would prevent the same employee

10. Both the Senate and House Committee Reports agree on the language of this statement of purpose. *Scindia*, 451 U.S. at 165-166, n.13.

from maintaining if he were injured on the dock. Such disregard of express Congressional intent is anathema to the judicial function of declaring rather than making the law. *The Lottawanna*, 88 U.S. at 576-577 ("[W]e must always remember that the court cannot make the [maritime] law; it can only declare it."). Judge Widener's dissent from denial of rehearing succinctly states the point:

> In a case such as this in which Congress has made its intention explicit, I suggest it is beyond our warrant to substitute our notions of public policy for that of Congress. *Local 1976, United Bhd. of Carpenters and Joiners v. N.L.R.B.*, 357 U.S. 93, 100 (1958) ("[I]t is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted.") "Whether the federal policy is a wise one is for the Congress and the Chief Executive to determine. Once they have spoken, it is our function to enforce their will." *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 293 (1965). (App. 67a)

The Fourth Circuit's creation of a new general maritime wrongful death remedy must accordingly be reversed.

III. Creating A New General Maritime Law Wrongful Death Cause Of Action To Trump Virginia's "Statutory Employer" Law Impermissibly Violates The State's Right To Regulate Tortious Conduct Within State Borders.

Our constitutional system is founded on the federalist principle that the States possess sovereign authority over "[a]ll the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people." The Federalist No. 45 at 296 (James Madison) (Isaac

Kramnick ed. 1987). Consequently, a State may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. *Askew v. American Waterways Operators*, 411 U.S. 325, 339 (1973).

The exercise of admiralty jurisdiction does not result in automatic displacement of state law. *Yamaha,* 516 U.S. at 206. On the contrary, federal maritime law has long recognized and accommodated the states' interest in regulating maritime affairs within their territorial waters, particularly with respect to wrongful death rights and remedies. *Id.*; *City of Norwalk*, 55 F. 98, 108 (S.D.N.Y. 1893) (courts have acknowledged states' interests with respect to tortious actions culminating in death within their territorial waters), *aff'd in part, rev'd in part*, 61 F. 364 (2d Cir. 1894). The States' right to govern conduct and recovery in the area of wrongful death has been confirmed by Congress in DOHSA ("The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to . . . . any waters within the territorial limits of any State . . ."), 46 U.S.C.A. § 767 (West 1975), and by this Court's holding in *The Tungus v. Skovgaard,* 358 U.S. 588 (1959), that admiralty courts enforcing a State wrongful death statute may not "pick and choose" among provisions but must enforce the State's policy *en toto*:

> The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind

> results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose. (*Id.* at 593)

Here, the Virginia Wrongful Death Act provides a cause of action for Garris to assert against third parties causing death in Virginia territorial waters. Va. Code Ann. § 8.01-50 *et seq*. That right of action is, however, subject to certain limitations prescribed by the Virginia legislature, including the immunity for "statutory employers" provided under the Virginia Workers' Compensation Act. Va. Code Ann. § 65.2-302 (2000).[11] This statutory scheme reflects the Virginia General Assembly's policy determination that general contractors in Virginia should bear the same burden (i.e. responsibility for workers' compensation payments owed to any injured employee) and benefit (immunity from tort liability) as direct employers with respect to the death of a Virginia worker in Virginia territorial waters. Virginia's policy determination is particularly compelling in the context of a local, land-based activity such as longshore and harbor work.[12]

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11. The statutory employer provision renders general contractors "liable to pay to any worker employed in the work any compensation due under this title [Workers' Compensation] which he would have been liable to pay if that worker had been immediately employed by him." Va. Code Ann. § 65.2-302 (2000) (bracketed material supplied). This provision is intended to protect employees of subcontractors who are not financially responsible and to prevent employers from relieving themselves of workers' compensation liability by subcontracting away work which they would otherwise do through direct employees. *Vess v. Davis Elec. Constructors, Inc.*, 613 F. Supp. 1047, 1049 (W.D. Va. 1985), *aff'd w/o op.*, 818 F.2d 30 (4th Cir. 1987); *Henderson v. Central Tel. Co.*, 233 Va. 377, 355 S.E.2d 596, 598-599 (1987).

12. Unlike ships and their crew, which move from port to port, longshore and harbor workers are a local workforce employed by local businesses to provide services at a given port in a single state.

The Fourth Circuit erred in attempting to preclude application of the statutory employer defense to Garris's claim in this case by creating an "end run" around Virginia state law in the form of a new negligence-based general maritime wrongful death cause of action. (App. 45a-48a) Virginia's sovereign authority to legislate wrongful death liability for a non-seaman killed in state territorial waters should be upheld by this Court regardless of whether that legislation favors plaintiff or defendant in this particular case. *See Hess v. United States*, 361 U.S. 314, 320 (1960) ("We are concerned with constitutional adjudication, not with reaching particular results in given cases.").[13]

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13. Most, if not all, state wrongful death statutes provide remedies at least as favorable to plaintiffs as those provided under the general maritime law for wrongful death. In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990), this Court held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman . . . whether under DOHSA, the Jones Act, or the general maritime law." Somewhat more expansive remedies are available to the estate of a deceased worker covered by the LHWCA. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) (approving recovery of loss of society to the dependent spouse of a longshoreman killed in state territorial waters). State wrongful death statutes, including Virginia's, generally permit recovery of all provable pecuniary and non-pecuniary damages in wrongful death cases. *See* Va. Code Ann. § 8.01-52 (damage to include compensation for "sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent"); W. Page Keeton, *Prosser and Keeton on Torts* 951 (5th ed. 1984) ("though the recovery for loss of society and comfort is denied under some statutes, it is an item usually recognized and made the basis for an award, at times apparently substantial").

IV. The Fourth Circuit's Result-Oriented Ruling Cannot Be Justified On Uniformity Grounds.

Consistent with its admiralty jurisdiction[14], an admiralty court may declare a uniform rule where required to protect "a 'characteristic feature' of admiralty" or when "uniform application [of the rule is] necessary to maintain the 'proper harmony' of maritime law" in its international and interstate relations. *American Dredging Co.*, 510 U.S. at 447; *see Jensen*, 244 U.S. at 216. This is not such a case. A judge-made negligence-based, wrongful death remedy applicable in state territorial waters is not a "characteristic feature" of admiralty. Nor is the uniform application of such a remedy necessary to maintain the "proper harmony" of maritime law in its international and interstate relations. The Fourth Circuit, therefore, erred in creating a new remedy for Garris to assert against Norshipco.[15]

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14. "The Constitution provides that the federal judicial power 'shall extend . . . to all Cases of admiralty and maritime Jurisdiction.' " *American Dredging Co. v. Miller*, 510 U.S. 443, 446 (1994) (quoting U.S. Const. Art. III, § 2, cl. 1).

15. The Fourth Circuit erroneously determined that an admiralty court should fashion a new maritime cause of action whenever "(1) Congress ha[s] not affirmatively expressed an intention to bar such a cause of action; and (2) creation of that cause of action [is] consistent with the policies of general maritime law articulated in the Jones Act — uniformity in the exercise of admiralty jurisdiction." *Garris*, 210 F.3d at 220 (App. 43a). This test permits judicial law-making whenever Congress has not expressly legislated on a subject and uniform rules would be helpful on that subject. It does not address the fundamental purpose of uniformity — to protect only the essential or characteristic features of admiralty. *Just v. Chambers*, 312 U.S. 383, 392 (1941).

A. A Negligence-Based, Wrongful Death Remedy Is Not A Characteristic Feature Of Admiralty.

Characteristic features of admiralty are those features that "originated in admiralty" or have "exclusive application there." *American Dredging Co.*, 510 U.S. at 450. For example, the warranty of seaworthiness originated in admiralty and primarily has exclusive application there. *See Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 100 (1944); *The Osceola*, 189 U.S. 158, 175 (1903). Likewise, an *in rem* action against a vessel is "distinctively an admiralty proceeding, and is hence within the exclusive province of the federal courts." *American Dredging Co.*, 510 U.S. at 447 (citing *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1867)).

Neither the concept of negligence nor the remedy for wrongful death originated or have exclusive application in admiralty. Admiralty law refused to recognize negligence in the early 1900's, *The Osceola*, 189 U.S. 158, 175 (1903), while "[a]bout the year 1825, negligence began to be recognized as a separate and independent basis of tort liability" in common law. William L. Prosser, *The Law of Torts*, § 28, at 140 (4th ed. 1971). Admiralty law also refused to recognize a remedy for wrongful death until long after development of wrongful death remedies in state and federal legislation. *See Moragne*, 398 U.S. at 389-90; *The Harrisburg*, 119 U.S. at 213-14. Furthermore, wrongful death, negligence actions do not enjoy exclusive application in admiralty. As the *Moragne* opinion aptly pointed out: "[i]n the United States, every State today has enacted a wrongful-death statute." *Moragne*, 398 U.S. at 390.

In short, therefore, the remedy Garris seeks to assert in this case is not one of the "characteristic features" of admiralty. "To the contrary, it is and has long been a doctrine of general application." *American Dredging Co.*, 510 U.S. at 450.

B. Wrongful Death Remedies Based On Negligence Need Not Be Uniform To Protect The Harmony Of General Maritime Law.

While uniformity is certainly an important goal, it is not "absolute" in scope or degree. *American Dredging Co.*, 510 U.S. at 451. Uniformity does not require "federal rules of decision" on every issue arising under admiralty jurisdiction. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545 (1995). "Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved." *Just v. Chambers*, 312 U.S. 383, 392 (1941). Consequently, uniformity does not command strict congruity on every legal remedy recognized in admiralty. The Constitution granted exclusive admiralty jurisdiction for "the convenience of the commercial world . . ." *The Lottawanna*, 88 U.S. at 575. The commercial world merely requires settled and predictable substantive rules — "rules upon which maritime actors [can] rely in making decisions about primary conduct." *American Dredging Co.*, 510 U.S. at 454. Settled and predictable rules tell maritime actors "how to manage their businesses and what precautions to take." *Id.* Thus, uniformity requires only stable and predictable substantive maritime law — not absolute standardization of every remedy recognized in admiralty.

1. This Court Has Concluded That State Wrongful Death Remedies Do Not Implicate Uniformity Concerns.

"There is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law." *The Tungus v. Skovgaard*, 358 U.S. 588, 594 (1959). This Court long ago "concluded that extending state wrongful-death statutes to fatal accidents in territorial waters was compatible with substantive maritime policies." *Yamaha*

516 U.S. at 207 (citing *Western Fuel Co.*, 257 U.S. at 242). Simply put, state wrongful death remedies are "local in character" and thus do not implicate uniformity concerns. *Western Fuel Co.*, 257 U.S. at 242. Accordingly, "variations in the remedies afforded by the States [have] long been deemed compatible with federal maritime interests." *Yamaha*, 516 U.S. at 211.

2. Congress Has Concluded That State Wrongful Death Remedies Do Not Implicate Uniformity Concerns.

Through its legislation in this area over the last century, Congress has repeatedly concluded that application of state wrongful death remedies does not upset the uniformity of general maritime law.

Congress passed DOHSA in 1920. Section 7 of DOHSA states: "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 46 U.S.C.A. § 767 (West 1975). DOHSA thus reflects Congress's determination that the dictates of admiralty do not require a uniform death remedy in state territorial waters: "Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas." *Miles*, 498 U.S. at 25; *accord Moragne*, 398 U.S. at 397-98; *The Tungus*, 358 U.S. at 593 ("The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths in waters within the territorial jurisdiction of the States.' "); *see also* 1 Steven F. Friedell, *Benedict on Admiralty* § 105 n.19 (citing 59 Cong. Rec. 4482, 4486).

Congress made a like determination in 1927 when it passed the LHWCA. Congress obviously had the opportunity to fashion uniform wrongful death remedies for harbor workers when it passed the LHWCA, as it had previously

done for seamen in the Jones Act, 46 U.S.C.A. § 688(a) (West Supp. 2000), and for all persons killed on the high seas in DOHSA, 46 U.S.C.A. § 761 (West 1975). Yet Congress rejected in the LHWCA a uniform tort remedy for harbor workers killed in state territorial waters and instead opted for a no-fault workers' compensation remedy that harbor workers could assert against their employers, 33 U.S.C.A. § 909 (West 1986). In doing so, Congress once again accepted non-uniform state laws as the source for any negligence-based, wrongful death remedies in state territorial waters.[16]

Congress reiterated that view for the third time in 1972 when it passed amendments to the LHWCA. These amendments continued to relegate harbor workers to state law for any negligence-based recovery for wrongful death against non-vessel parties. The timing of those amendments alone is significant. It shows that Congress remained steadfast in its preference for state wrongful death statutes for harbor workers despite the passage of nearly 50 years that otherwise saw increasing liberality in remedies

16. By granting different remedies to harbor workers and seamen, Congress decided that harbor workers and seamen do not require the same type of uniform protection. In its cases distinguishing Jones Act seamen and harbor workers, this Court has recognized the unique "perils" that Jones Act seamen encounter as a result of their "substantial" connection to a vessel in navigation. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Harbor workers, who "have only a transitory or sporadic connection to a vessel in navigation" are not entitled to the tort remedy provided in the Jones Act. *Id.* Nor are harbor workers entitled to unseaworthiness remedies. 33 U.S.C.A. § 905(b) (West 1986). As land-based workers, harbor workers typically live and work on land. Like their friends and neighbors on land, they are entitled to the protections of state law — with the one exception being the Congressionally mandated workers' compensation protections provided in the LHWCA. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 722, 723-24 (1980) (noting that Congress intended the LHWCA to raise workers' compensation benefits "to a federal minimum").

for injured persons not only in admiralty, but in the law generally. *See Moragne*, 398 U.S. at 390.

The 1972 amendments are especially significant insofar as they expressly overturned the expansion of the unseaworthiness doctrine to harbor workers recognized in *Moragne*. This negation of special, uniform maritime remedies is expressed in what is now 33 U.S.C. § 905(b), which specifically eliminates the right of longshoremen and harbor workers to recover against a vessel on the basis of unseaworthiness. *See Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 165 (1981) (recognizing that 1972 amendments abolished longshoremen's right to recover for unseaworthiness).

In addition to overruling the remedy that *Moragne* granted, Congress expressed its intention in the legislative history of the 1972 amendments that general judge-made admiralty remedies should not supplement the LHWCA or existing state law remedies. That legislative history reveals that in passing § 905(b), Congress intended:

> **to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned,** and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness," "non-delegable duty," or the like. (H.R. Rep. No. 92-1441 (1972); 1972 U.S.C.C.A.N. at 4703; emphasis supplied)

In other words, in repealing *Moragne* Congress expressed the plain view that harbor workers killed in state territorial waters should be governed by state wrongful death statutes for any negligence-based recovery. *See also Parker v. South*

Louisiana Contractors, Inc., 537 F.2d 113, 117 (5th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977) ("Taken as a whole," therefore, "the manifest purpose of section 905(b) is to curtail rather than expand the availability of third party actions in admiralty.").

Viewed together, this history evinces quite clearly Congress's "considered judgment," *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), "not to intrude on state legislative competence" regarding the ability of harbor workers to recover in negligence for deaths in state territorial waters, Friedell, *Benedict on Admiralty* § 105 n.19, "because Congress believed state statutes sufficient in those areas." *Miles*, 498 U.S. at 25; *see also Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) (looking to legislative history of 1972 LHWCA amendments to ascertain congressional purpose behind enactment); *accord, Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297 (1983); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977); *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980).

The significance of this Congressional determination cannot be overstated. It is, of course, a settled proposition that " '[f]ederal courts are bound to apply rules enacted by Congress with respect to matters . . . over which it has legislative power.' " *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967)). Where Congress has spoken on such a matter, therefore, it is not for the courts to debate the "wisdom" or the "pros and cons" of Congress's choice. *MCI Telcoms. Corp. v. AT & T.*, 512 U.S. 218, 234 (1994); *United States v. Rodgers*, 466 U.S. 475, 484 (1984). A court must defer to that decision regardless of whether a court believes Congress's choice would "lead to a harsh result." *United States v. Locke*, 471 U.S. 84, 95 (1985).

These principles reflect the fundamental fact "that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is 'subject to the paramount authority of Congress.' " *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). "Thus, once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter the task of the federal courts is to interpret and apply the statutory law, not to create common law." *Northwest Airlines*, 451 U.S. at 95 n.34 (citing *Illinois v. Milwaukee*, 406 U.S. 91, 107 (1972), and *Arizona v. California*, 373 U.S. 546, 565-66 (1963)). Any contrary approach would be antithetical to our democratic system of government and would embroil courts in "usurp[ing] the policymaking and legislative functions of duly elected representatives." *Heckler v. Mathews*, 465 U.S. 728, 741 (1984).

These principles fully apply to the realm of admiralty jurisdiction. As in other substantive areas of the law, courts are "poorly positioned" to second-guess the merits of congressional enactments in admiralty, even where those enactments subject longshoremen "to the mercies of state law." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 215-16 (1971). Debates over the merits of those decisions "are best presented in the legislative forum, not here." *Id.* at 216. Consequently, as this Court has recognized on numerous occasions, courts should not resort to general admiralty jurisdiction to supplement a remedial admiralty scheme enacted by Congress. *Dooley v. Korean Airlines Co., Ltd.*, 524 U.S. 116, 124 (1998) ("Even in the exercise of our admiralty jurisdiction, we will not upset the balance struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt."); *Northwest Airlines*, 451 U.S. at 95 ("Even in

admiralty, however, where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress."); *Mobil Oil*, 436 U.S. at 624 ("because Congress' considered judgment has great force in its own right . . . a desire for uniformity cannot override the statute.").

Indeed, this Court has on several occasions declined to utilize general admiralty jurisdiction to fashion a remedy in light of the LHWCA and the 1972 amendments to that Act. The exercise of that power, the Court concluded, could upset the careful balance of interests settled upon by Congress in those enactments, making inappropriate the expansion of new remedies by judicial decree. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979); *Cooper Stevedoring, Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974); *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952), *overruled in part*, 421 U.S. 397 (1975).

That historical restraint should continue here. Congress has enacted a comprehensive statute, the LHWCA, that governs harbor workers injured or killed in state territorial waters. Through that statute, Congress has made clear that, in its opinion, application of state wrongful death statutes to harbor workers does not offend admiralty principles. *See Dooley*, 524 U.S. at 122-124 (relying on comprehensive nature of DOHSA to reject judge-made survivor action for death on high seas); *Northwest Airlines*, 451 U.S. at 97 ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme. . . ."). That statute has been the prevailing view of Congress for the better part of a century. *See Walters v. National Ass'n. of Radiation Survivors*, 473 U.S. 305, 323 (1985) (courts cannot "cavalierly dismiss[] a long-asserted congressional purpose" reflected in a statute of long standing); *accord, Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 332 (1999); *MCI*, 512 U.S. at 234.

Against this backdrop of congressional action, it would be improper and imprudent for the Court to declare that notions of uniformity require a negligence-based tort remedy in admiralty for harbor workers killed in state territorial waters. Such a declaration would have courts improperly "substitute [their] views for those expressed by Congress." *Dooley*, 524 U.S. at 123 (quoting *Mobile Oil*, 436 U.S. at 626)).

C. Creating A New General Maritime Wrongful Death Remedy To Further Uniformity Is Unnecessary And Ill-Advised.

Not only has the Court and Congress determined that the lack of a uniform negligence-based, wrongful death remedy in state territorial waters does not upset uniformity, but creating such a remedy now will upset the settled reliance interest of maritime actors on the current remedial regime. The Court in *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921), held that admiralty courts should recognize and enforce available state wrongful death remedies. Furthermore, when Congress passed DOHSA in 1920, it did not legislate within state territory because it wanted to preserve the application of state wrongful death remedies. *Moragne*, 398 U.S. at 398. Thus, at least since the early 1920's, maritime actors have known that state wrongful death remedies apply to deaths occurring on state territorial waters. Since the early 1920's, therefore, maritime actors have conformed their business practices and primary conduct in reliance on the availability of state wrongful death remedies.

Admiralty courts are not free to select and enforce only the agreeable facets of state law; they must enforce the state remedial scheme as a whole. "The decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful-death, it must enforce the right as an integrated whole, with whatever conditions

and limitations the creating State has attached." *The Tungus*, 358 U.S. at 592; *see Hess v. United States*, 361 U.S. 314, 319 (1960); *Goett v. Union Carbide Corp.*, 361 U.S. 340, 342 (1960). Thus, "[i]t is incumbent upon a court enforcing [state] policy to enforce it all; it may not pick or choose." *The Tungus*, 358 U.S. at 593.

State wrongful death remedies take many forms. At least in the employer-employee context, the legislature of every state has seen fit to convert employee tort remedies into a no-fault or strict liability workers' compensation remedy. 1 Arthur Larson, *Workmen's Compensation Law*, § 2.08 (2000) (hereinafter "Larson"). Employees no longer need to assert uncertain tort claims against employers; they receive certain quantifiable benefits regardless of fault for the injury or death. *See* Larson § 1.03; 82 Am. Jur. 2d, *Workers' Compensation*, §§ 5, 6 (1992). On the other hand, employers no longer face the uncertainty of run-away tort claims; they contract with insurers to pay the quantifiable benefits statutorily due to every employee injured or killed on the job. *See* Larson § 1.03; 82 Am. Jur. 2d, *Workers' Compensation*, §§ 5, 6. The wisdom of this conversion has been the subject of much debate. *See New York Central R.R. Co. v. White*, 243 U.S. 188, 199-200 (1917); Martha T. McCluskey, *The Illusion of Efficiency In Workers' Compensation "Reform"*, 50 Rutgers L. Rev. 657 (1998); Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 Ga. L. Rev. 843 (1987). In simple terms, however, obvious economic benefits accrue to the employer, employee, the court system, and to society in general whenever a no-fault workers' compensation scheme replaces a litigious tort recovery scheme. *See, e.g.* 82 Am. Jur. 2d, *Workers' Compensation* § 5. Congress has approved of this conversion for harbor workers and District of Columbia employees.

See 33 U.S.C.A. §§ 901-950 (West 1986); *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 931 (1984) (discussing the legislative "compromise" inherent in the LHWCA); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412 (1953) (discussing LHWCA goal of "protect[ing] employers who are subject to absolute liability by the Act").

The workers' compensation schemes of the various states are not all uniform. *See* Larson, § 2.08. Nor are they all like the LHWCA. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 722, 725 (1980). One difference is that the workers' compensation statutes in Virginia and several other states provide slightly greater tort immunity to general contractors as "statutory employers" than that found in the LHWCA. *Compare* Va. Code Ann. §§ 65.2-307(A), -302 (Michie 1995) *with* 33 U.S.C.A. §§ 902(4), 905(a) (West 1986); *see Ward v. Norfolk Shipbuilding & Drydock Corp.*, 770 F. Supp. 1118, 1120 (E.D. Va. 1991) (Virginia law); *Leone v. Columbia Sussex Corp.*, 610 N.Y.S.2d 586, 587 (N.Y. App. Div. 1994) (New York law); *Torch Operating Co. v. Bartell*, 865 S.W.2d 552, 555 (Tex. Ct. App. 1993) (Louisiana law); *Walker v. United Steel Workers, Inc.*, 606 So. 2d 1243, 1244 (Fla. Dist. Ct. App. 1992) (Florida law); *Matthews v. United States*, 825 F.2d 35, 36-37 (4th Cir. 1987) (Maryland law); *Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910, 912 (4th Cir.) (South Carolina law), *cert. denied*, 479 U.S. 914 (1986); *Capetola v. Barclay White Co.*, 139 F.2d 556, 559-60 (3d Cir. 1943) (Pennsylvania law), *cert. denied*, 321 U.S. 799 (1944); *see also* 82 Am. Jur. 2d, *Workers' Compensation* § 71 (1992).

The Fourth Circuit recognized this difference in tort immunity with regard to the Virginia workers' compensation scheme. It assumed that Norshipco was Garris' statutory employer under the Virginia Workers' Compensation Act and,

therefore, determined that Norshipco had an affirmative defense to Garris' claim under the Virginia Wrongful Death Act. *Garris*, 210 F.3d at 220 (App. 43a) (Garris "apparently cannot recover against [Norshipco] under the Virginia wrongful-death statute").[17]

Noting that Garris could only assert a workers' compensation claim, the Fourth Circuit concluded that she had "no right of recovery under the existing statutory scheme." *Id.* This conclusion prompted the Fourth Circuit to create a new tort remedy. *Id.* at 220-21 (App. 45a) ("We see no reason to deny Garris a basis of recovery simply because her son was a harbor worker who died in Virginia"). By doing so, the Fourth Circuit substituted its judgment for the considered judgment of the 140-member Virginia General Assembly. In direct contrast to the Virginia General Assembly, the Fourth Circuit apparently believed that Garris should have a negligence action against Norshipco in addition to her no-fault workers' compensation claim.

Maritime employers and contractors employing workers in Virginia and other states must insure against workers' compensation liability. Because the LHWCA and state workers' compensation laws operate concurrently, *see Sun Ship, Inc.*, 447 U.S. at 721, this liability may not be the same in every case; it depends upon whether the injured worker files his claim under state law, the LHWCA, or both. The liability of the employer, nevertheless, is based on no-fault principles. Its value is pre-determined by a statutory schedule, 82 Am. Jur. 2d § 6; 33 U.S.C.A. §§ 908, 909,

17. The district court did not rule on Garris' state law wrongful death claim. It merely dismissed the state claim without prejudice. (App. 20a) Garris did not appeal the dismissal, or brief the merits of her state claim, to the Fourth Circuit. (App. 23a) Thus, the issue of Norshipco's Virginia workers' compensation tort immunity has never been fully litigated in this case. Garris merely claims that she has no meritorious tort remedy against Norshipco. For purposes of argument in this brief, Norshipco agrees.

with disagreements being decided in an abbreviated administrative forum. 82 Am. Jur. 2d §§ 517, 518; 33 U.S.C.A. § 919. Thus, employers including levels of general and subcontractors are able to structure their business dealings to economically insure sufficient workers' compensation coverage for their employees.

Creating a new tort-based cause of action for harbor workers in state territorial waters would upset the settled and predictable state rules under which maritime employers currently operate. Adding the new remedy may place maritime contractors and subcontractors in the untenable position of defending against both no-fault workers' compensation liability and negligence-based tort liability asserted by the same employee. This would transform the current settled and predictable no-fault scheme into an unpredictable and expensive dual liability scheme. *American Dredging Co.*, 510 U.S. at 454.

The cost and inequity of being subject to both species of liability should not be underestimated. Before the 1972 amendments to the LHWCA, judge-made admiralty rules began to partially destroy employer tort immunity under the LHWCA. At that time, developing maritime law permitted shipowners to seek indemnity against stevedores for tort damages paid to longshoremen injured onboard vessels. *See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). Congress amended the LHWCA in 1972 to eliminate this costly indemnity and preserve the employer tort immunity written into the Act. *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 97 (1994); *Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156, 171-72 (1981); *see* H.R. Rep. No. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4704 (expanding on Congressional dissatisfaction with *Ryan* indemnity). Here, the remedy created by the Fourth Circuit may override the workers' compensation tort immunity found in Virginia and other

states. Potentially upsetting the long established and settled state remedial scheme will not serve to promote harmony along the waterfront.

In sum, creating a new wrongful death tort remedy to overlay the current no-fault remedial scheme will harm rather than promote harmony and uniformity. Congress has determined that such a uniform remedy is not needed. Likewise, the collective judgment of the 140-member General Assembly of Virginia is that Garris should not have a negligence-based, tort remedy to assert against Norshipco. In deciding whether to fashion new law even in the domain of admiralty the Court should recognize and heed these clear legislative signals. *See Dooley*, 524 U.S. 123-124; *Northwest Airlines*, 451 U.S. at 95; *Mobil Oil*, 436 U.S. at 626.

CONCLUSION

The relevant acts of Congress and over one hundred years of Supreme Court precedent establish that it is state — not federal — law that has and should continue to govern the availability of a negligence-based wrongful death cause of action for a non-seaman killed in state territorial waters. The fundamental federalism principle underlying these legislative and judicial pronouncements counsels strongly against creation of a new general maritime wrongful death remedy adopted solely to circumvent application of a state "statutory employer" law. Separation of powers is also an overriding concern in this instance: the federal court should not step in to create a cause of action which Congress has had repeated opportunities to consider but has nonetheless declined to adopt. These critical constitutional doctrines should not be sacrificed at the altar of uniformity where, as here, existing state law remedies do not implicate a "characteristic feature" of admiralty or interfere with the proper harmony and uniformity of that law in its international or interstate

relations — and thus no new general maritime remedy is needed or warranted. The Fourth Circuit's ruling must accordingly be reversed.

Wherefore, for all of the reasons expressed herein, Petitioner Norfolk Shipbuilding & Drydock Corporation respectfully requests this Honorable Court to reverse the opinion and judgment of the Fourth Circuit establishing a new maritime law cause of action for negligence-based wrongful death occurring in state territorial waters.

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